

Fordham International Law Journal

Volume 29, Issue 3

2005

Article 3

Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone

Chandra Lekha Sriram*

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Chandra Lekha Sriram

Abstract

Even as the International Criminal Court undertakes investigations in Uganda and the Democratic Republic of Congo, policymakers and academics continue to debate what the “right” tools to respond to past atrocities are. Naturally there are concerns that justice must be done, weighed against concerns that weak States will be destabilized by attempts at accountability. While many have celebrated the entry into force of the International Criminal Court Statute and the exercise of universal jurisdiction, the United States continues to challenge both of these tools of international justice as undemocratic and illegitimate. There are also reasons to be concerned that tools of international*473 justice, operating as they do very far from the victims and sites of the original crimes, may simply fail to accomplish what we hope for. The ad hoc criminal tribunals for the former Yugoslavia and Rwanda are both being encouraged to complete work by 2008 –they have prosecuted relatively few cases over the course of more than a decade, but have contributed significantly to the corpus of international law. International justice may be developing, but it has its limits. Yet, it is also the case that after civil war or internal atrocity, domestic courts are often unable or unwilling to seriously pursue cases. This leaves a potential gap, one that some believe can be filled by a device between the national and the international–hybrid or mixed–tribunal. While these tribunals are said by some to be an example of “right-sizing” international justice, the case of the Special Court for Sierra Leone (“SCSL”, “the Court,” or “Special Court”) suggests that, perhaps, we ought not be so sanguine. While perhaps a necessary compromise, the Court suffers from the limits of being a partially domestic court, in terms of resources and mandate, but also from the limits of being a partially international court, in that it is viewed by many as foreign. Understanding the workings of different justice mechanisms is, importantly, more than a concern for lawyers these days: It is centrally bound up with any discussion of effective conflict resolution, war termination, and longer term peace implementation.

WRONG-SIZING INTERNATIONAL JUSTICE? THE HYBRID TRIBUNAL IN SIERRA LEONE

Chandra Lekha Sriram*

INTRODUCTION: WHAT SIZE SHOULD INTERNATIONAL JUSTICE BE?

Even as the International Criminal Court undertakes investigations in Uganda and the Democratic Republic of Congo, policymakers and academics continue to debate what the “right” tools to respond to past atrocities are. Naturally there are concerns that justice must be done, weighed against concerns that weak States will be destabilized by attempts at accountability.¹ While many have celebrated the entry into force of the International Criminal Court Statute² and the exercise of universal jurisdiction,³ the United States continues to challenge both of these tools of international justice as undemocratic and illegitimate.⁴ There are also reasons to be concerned that tools of interna-

* Dr. Chandra Lekha Sriram is Professor of Human Rights at the University of East London School of Law. She is the author of *CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS. PEACE IN TIMES OF TRANSITION* (2004), and *GLOBALISING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY* (2005). The author gratefully acknowledges the support of the British Academy for field research in Freetown, Sierra Leone, during summer 2004 under Grant No. SG-3725; the author also gratefully acknowledges the time and space granted by the Rockefeller Foundation’s Bellagio Study and Conference Center, which aided immeasurably in the writing process.

1. The literature on the subjects of both transitional justice and international criminal accountability is too expansive to be fully cited here. Important works include, to note just a few, STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2001); *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995); PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001); and RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* (2002). Most have been works of international lawyers or policy analysts, although mainstream political science has begun to address these issues more directly. See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5 (2004).

2. See David Davenport, *The New Diplomacy*, POL’Y REV., Dec. 2002 & Jan. 2003, <http://www.policyreview.org/dec02/davenport.html>; see also Richard Bilder, *Recent Books on International Law*, 97 AM. J. INT’L L. 712 (2002); LAWYERS COMM. FOR HUMAN RIGHTS (now HUMAN RIGHTS FIRST), *UNIVERSAL JURISDICTION: MEETING THE CHALLENGE THROUGH NGO COOPERATION* (2002), available at http://www.humanrightsfirst.org/international_justice/w_context/meeting_challenge310502.pdf.

3. See generally *UNIVERSAL JURISDICTION*, *supra* note 2.

4. On the “undemocratic” objection, see Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court*, 12 FINNISH Y.B. INT’L L. 109, 112 (2001).

tional justice, operating as they do very far from the victims and sites of the original crimes, may simply fail to accomplish what we hope for.⁵ The ad hoc criminal tribunals for the former Yugoslavia and Rwanda are both being encouraged to complete work by 2008⁶—they have prosecuted relatively few cases over the course of more than a decade, but have contributed significantly to the corpus of international law.⁷ International justice may be developing, but it has its limits. Yet, it is also the case that after civil war or internal atrocity, domestic courts are often unable or unwilling to seriously pursue cases. This leaves a potential gap, one that some believe can be filled by a device between the national and the international—hybrid or mixed—tribunal. While these tribunals are said by some to be an example of “right-sizing” international justice, the case of the Special Court for Sierra Leone (“SCSL,” “the Court,” or “Special Court”) suggests that, perhaps, we ought not be so sanguine.⁸ While perhaps a necessary compromise, the Court suffers from the limits of being a partially domestic court, in terms of resources and mandate, but also from the limits of being a partially international court, in that it is viewed by many as foreign.⁹ Understanding the workings of different justice mechanisms is, importantly, more than a concern for lawyers these days: It is centrally bound up with any discussion of effective conflict resolution, war termination, and longer term peace implementation.¹⁰

5. See generally Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301 (2003).

6. See S.C. Res. 1503, ¶7, U.N. Doc. S/RES/1503 (Aug. 28, 2003); see also S.C. Res. 1534, ¶3, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

7. See generally YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT (2004); INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN THE CASE LAW OF THE ICTY (Gideon Boas & William A. Schabas eds., 2003).

8. See generally Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT'L AFF. 311 (2004).

9. See Denis Bright, *The Conflict and the World*, Address at the Conflict, Development and Peace Network (“CODEP”) Conference (June 18-20, 2001), available at http://www.c-r.org/pubs/occ_papers/slcnfct.shtml.

10. This literature, too, is burgeoning. Important works include: BARBARA WALTER, COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS (2002); ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS (Stephen John Stedman et al. eds., 2002); and PEACEBUILDING AS POLITICS: CULTIVATING PEACE IN FRAGILE SOCIETIES (Elizabeth M. Cousens & Chetan Kumar eds., 2001).

WHAT IS A HYBRID COURT?

A hybrid court is a novel development in international attempts at accountability for past offenses.¹¹ Unlike the international ad hoc criminal tribunals or the International Criminal Court, a hybrid court is not purely a creation of the international community, employing international law and international prosecutors and judges.¹² It is also distinct from domestic processes, such as prosecutions or commissions of inquiry, in that it does not solely utilize domestic judges and law.¹³ Instead, it is an attempt to address the limitations of domestic and international models, utilizing a complex mix—determined on a case-by-case basis—of domestic and international law and domestic and international judges and staff.¹⁴ A hybrid court theoretically runs less of a risk of being subject to political pressures, or compelled to use limited, antiquated, or unjust laws, as domestic courts might do alone.¹⁵ It is also less likely to be removed from the circumstances where the crimes occurred, which should assist the hybrid court not only in obtaining information and witnesses, but also in serving to inform and educate the populace at large, and perhaps help to build the capacity of collapsed domestic legal institutions.¹⁶ Thus, in many instances, it is considered the “right size” of justice.

Proponents of the mixed or hybrid tribunal argue that it may offer the best of both national and international justice.¹⁷ They suggest that hybrid tribunals, which are composed of domestic and international judges and often utilize a combination of domestic and international law, can evade the risk of political manipulation that domestic courts face and that, unlike international tribunals, they are better suited to the needs of countries emerging from conflict.¹⁸ However, while in principle this logic is appealing, in practice hybrid tribunals have proven flawed.

11. See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306-08 (2003).

12. See *id.* at 298.

13. See *id.*; see also Nancy Kaymar Stafford, *A Model War Crimes Court: Sierra Leone*, 10 ILSA J. INT'L & COMP. L. 117, 135, 140, 142 (2003).

14. See Dickinson, *supra* note 11, at 295, 298-300; see also Stafford, *supra* note 13, at 135, 140, 142.

15. See Dickinson, *supra* note 11, at 301-06.

16. See *id.* at 302-04; see also Stafford, *supra* note 13, at 133-34.

17. See Dickinson, *supra* note 11, at 298; see also Stafford, *supra* note 13, at 138.

18. See Stafford, *supra* note 13, at 141.

This Essay examines the experience of the Special Court for Sierra Leone, which represents an important commitment of the international community to post-conflict justice, and which has produced important judicial decisions, but which does not appear to otherwise fulfill the great hopes of hybrid tribunal advocates.

The Special Court Experiment

The history of the conflict in Sierra Leone is well known and need not be rehearsed here in any detail.¹⁹ Conflict between the government and the Revolutionary United Front ("RUF") erupted in 1991 and endured for over a decade, resulting in an estimated 50,000 to 75,000 deaths and widespread atrocities, including mutilation and sexual violence.²⁰ The conflict was notable also for the widespread use of child combatants—often abducted and drugged—who were both victims and perpetrators of abuses.²¹ It appeared that the conflict might finally end when negotiations in 1999 resulted in the Peace Agreement Between the Government of Sierra Leone and the Revolutionary Unified Front of Sierra Leone ("Lomé Accord" or "Abidjan Accord"), and the mandate by the United Nations ("U.N.") Security Council for a peacekeeping force, the U.N. Assistance Mission in Sierra Leone ("UNAMSIL").²² The accord provoked concern from the international community for its inclusion of an amnesty for crimes committed during the con-

19. See generally JOHN HIRSCH, *SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY* (2001). On the regional dimensions of the conflict, see Michael Pugh et al., *Sierra Leone in West Africa*, in *WAR ECONOMIES IN A REGIONAL CONTEXT* 91 (2004); Comfort Ero & Jonathan Temin, *Sources of Conflict in West Africa*, in *EXPLORING SUBREGIONAL CONFLICT: OPPORTUNITIES FOR CONFLICT PREVENTION* 141 (Chandra Lekha Sriram & Zoe Nielsen eds., 2004); and *WEST AFRICA'S SECURITY CHALLENGES: BUILDING PEACE IN A TROUBLED REGION* (Adekeye Adebajo & Ismail Rashid eds., 2004).

20. See Sheryl Dickey, *Sierra Leone: Diamonds for Arms*, 7 HUM. RTS. BRIEF 9, 9 (2000).

21. See Chante Lasco, *News from the International Criminal Tribunal*, 10 HUM. RTS. BRIEF 26, 27 (2002).

22. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999 [hereinafter *Lomé Accord*], available at <http://www.sc-sl.org/abujaagreement.html>; see also U.N. Mission in Sierra Leone (UNAMSIL), S.C. Res. 1270, UN Doc. S/RES/1270 (Oct. 22, 1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/315/02/PDF/N9931502.pdf?OpenElement>.

flict,²³ and the U.N., which acted as a “moral guarantor” of the agreement, issued a reservation indicating that it did not consider the amnesty provision to cover international crimes.²⁴ Despite the agreement, fighting and atrocities continued, along with attacks on UNAMSIL. In May of 2000, the notorious RUF leader Foday Sankoh was captured, leading to discussions of the possibility of an international or other tribunal to prosecute him and other war criminals.²⁵ That June, the government asked the U.N. to set up a court to try such cases.²⁶

Ultimately, a complex system of a commission of inquiry and a mixed tribunal was created to address accountability for past abuses.²⁷ While both institutions are too new to assess properly, it is worth examining their features briefly and considering the prospects for success. Certainly, the relevance of proceedings in the tribunal is of concern to many in the international community who seek to support it. This would suggest that the international community has recognized key concerns from the Timorese experience.²⁸ Whether a mixed tribunal can surmount problems, such as the disconnect between international and local processes, and a lack of understanding by, or inclusion of, the local population, remains to be seen. The SCSL may well prove an interesting test case. Because the Court is unique in several respects, any discussion of its potential or potential limitations must begin with key features of the institution itself.

General Mandate of the Court

The U.N. created the Special Court through an agreement with the government of Sierra Leone and pursuant to U.N. Security Council Resolution 1315 in August 2000.²⁹ As discussed

23. See Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 *BERKELEY J. INT'L L.* 436, 441 (2002).

24. See *id.*; see also Lomé Accord, *supra* note 22, art. 34.

25. See Stephanie H. Bald, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice in its Children?*, 18 *AM. U. INT'L L. REV.* 537, 557-58 (2002).

26. See *id.* at 558.

27. See Special Court Agreement, 2002 Ratification Act, 2002, Supplement to Sierra Leone Gazette Vol. CXXXIII, No. 22 (Apr. 25, 2002) [hereinafter Ratification Act 2002], available at <http://www.sc-sl.org/Documents/SCSL-ratificationact.pdf> (outlining the administration of the Special Court for Sierra Leone). See generally Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 *AFR. HUM. RTS. L.J.* 107 (2001).

28. See Sriram, *supra* note 5, at 419-20.

29. See Agreement Between the United Nations and the Government of Sierra Le-

below, it is worth noting that, in this instance, the Council was not acting in Chapter VII mode.³⁰ The Court's statute, completed on January 16, 2002, gives it the power to prosecute persons who bear the greatest responsibility for serious violations of national and international humanitarian law since November 30, 1996.³¹ The crimes within the ambit of the Court include crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II, other serious violations of international humanitarian law, and crimes under national law.³² In March 2002, the agreement for the Court was formally ratified.³³

Eight to eleven judges of mixed international backgrounds sit on the Court.³⁴ Following the agreement between the U.N. and the government of Sierra Leone, the Trial Chamber is to consist of three judges—one appointed by the government and two by the U.N. Secretary-General—based on nominations from Member States.³⁵ Any additional Trial Chambers will be similarly composed.³⁶ Five judges are to serve on the appeals chamber, of whom two will be selected by the government and three by the Secretary-General.³⁷

Relation to the Truth and Reconciliation Commission

The establishment of the Special Court was nearly contem-

one on the Establishment of a Special Court for Sierra Leone, Introduction (Jan. 16, 2002) [hereinafter Special Court Agreement], available at <http://www.sc-sl.org/scsl-agreement.html>; S.C. Res. 1315, U.N. Doc. S/Res/1315 (Aug. 14, 2000).

30. Chapter VII of the United Nations Charter allows the Security Council to make determinations about the existence of a "threat to the peace, breach of the peace, or act of aggression," and to either make "recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. Charter art. 39, available at <http://www.un.org/aboutun/charter/chapter7.htm>.

31. Statute of the Special Court, art. 1 (Jan. 16, 2002), Annex to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter Special Court Statute], available at <http://www.sc-sl.org/scsl-statute.html>. For the date of completion of the Statute of the Special Court, see Ratification Act 2002, *supra* note 27, art. 1.

32. See Special Court Statute, *supra* note 31 arts. 2-5.

33. See Ratification Act 2002, *supra* note 27.

34. See Special Court Statute, *supra* note 31, art. 12.

35. See *id.*

36. See The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 46, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *SCSL Establishment Report*] (recommending two Trial Chambers, each composed of three judges).

37. See Special Court Statute, *supra* note 31, art. 12.

poraneous with the creation of the Truth and Reconciliation Commission (“TRC” or “Commission”).³⁸ In principle, their responsibilities do not overlap and there ought not be any conflicts between the two institutions.³⁹ The Commission, as is common for commissions of inquiry, does not have the power to punish, but rather to investigate the causes, nature, and extent of the violence, and also to make recommendations regarding reparations and legal, political, and administrative reform.⁴⁰ Concerns remain, however, about the handling of evidence and witnesses in particular.⁴¹ There was a possibility that evidence disclosed to the Commission, which has different remit and evidentiary requirements, could also be brought before the Court; while the Court’s prosecutor foreclosed that option, many believe it is still a risk.⁴² Care must be taken to ensure that the introduction of such evidence does not violate due process, and that those who provide evidence are not endangered. Alternatively, it may be the case that in an attempt not to overlap with the Commission, the Court impedes its work—in several instances indictees held by the Court have not been allowed to testify before the Commission, leading to tensions, as discussed in the controversy surrounding Sam Hinga Norman below.⁴³ Perceptions of the TRC, as of the Court, have been mixed—while some view it as an important institution with greater national ownership, difficulties with outreach and management have engendered significant criticisms.⁴⁴

38. See Lomé Accord, *supra* note 22, art. 6 (mandating the establishment within two weeks of the signing of the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of a Commission for the Consolidation of Peace, which must set up a Truth and Reconciliation Commission). See generally Laura Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT’L L.J. 287 (2003) (discussing the concurrent establishment of the two statutes and their relationship to one another).

39. Compare Lomé Accord, *supra* note 22, *passim* with Truth and Reconciliation Commission Act 2000, ¶ 6 (Feb. 22, 2000), available at <http://www.sierra-leone.org/Laws/2000-4.pdf>.

40. See Truth and Reconciliation Commission Act 2000, *supra* note 39, ¶¶ 6-8, 15.

41. See Schocken, *supra* note 23, at 452-53.

42. See *id.* at 456.

43. See Kim Lanegran, *The First Two Years of the Special Court for Sierra Leone*, 19-20 (Mar. 17, 2004) (paper prepared for the International Studies Association Annual Convention, on file with author).

44. See Interview with Wilfred Bangora, Nat’l Forum for Human Rights, in Freetown, Sierra Leone (July 15, 2004) [hereinafter Interview with Bangora] (not for attribution, on file with author); see also Interview with David Crane, Prosecutor of the Spe-

Some, such as the Special Court Prosecutor David Crane, believe that operating the Commission and Court more or less simultaneously was a positive and innovative choice.⁴⁵ Others, however, suggested that this simultaneous operation undermined the work of one or the other, or of both, institutions.⁴⁶ In particular, as discussed below, there were fears that the belief that the Court would use evidence presented before the TRC would prevent certain actors from testifying, or testifying fully and truthfully, before that institution. Initially, fears about sharing evidence prevented some perpetrators from testifying before the TRC, although such fears subsided over time.⁴⁷ Many participants in and witnesses to the TRC process, however, have noted that those who testified often did not testify fully, and that often perpetrators who confessed to serious abuses exhibited no remorse or desire for forgiveness.⁴⁸ They have suggested that—in contrast to the South African TRC, which had the capacity to

cial Court for Sierra Leone, in Freetown, Sierra Leone (July 6, 2004) [hereinafter Interview with Crane] (not for attribution, on file with author). In particular, many of the Sierra Leonean commissioners were viewed as demonstrating bias in favor of the government and its supporters during the hearings. Interviews with NGO and United Nations ("U.N.") officials, in Freetown, Sierra Leone (July 2004). For a variety of perspectives on the Special Court for Sierra Leone ("SCSL") and the Truth and Reconciliation Commission ("TRC"), see Nat'l Forum for Human Rights, Report on Monitoring the Two Transitional Justice Mechanisms in Sierra Leone (Special Court for Sierra Leone and the Truth and Reconciliation Commission) (July 2004) (copy on file with author).

45. See generally Interview with Crane, *supra* note 44.

46. See, e.g., Interview with Derek Smith, Second Sec'y of Press & Pub. Affairs, British High Comm'n, in Sierra Leone (July 13, 2004) [hereinafter Interview with Smith] (not for attribution, on file with author); Interview with Desmond Molloy, Officer in charge of the Disarmament, Demobilization, and Reintegration Section at the U.N. Assistance Mission in Sierra Leone ("UNAMSIL"), in Sierra Leone (July 9, 2004) [hereinafter Interview with Molloy] (not for attribution, on file with author); Interview with Robin Vincent, Registrar, Special Court for Sierra Leone, Sierra Leone (July 12, 2004) [hereinafter Interview with Vincent] (not for attribution, on file with author). Some suggested that the operation at the same time was not necessarily bad, but that it ought not have been allowed to occur accidentally, as it did in Sierra Leone, but only if done by careful design. See Interview with Bert Theuermann, UNAMSIL Child Prot. Adviser, in Vienna, Austria (July 1, 2004) [hereinafter Interview with Theuermann] (not for attribution, on file with author).

47. See Interview with Valnora Edwin, Campaign for Good Governance, in Freetown, Sierra Leone (July 13, 2004) [hereinafter Interview with Edwin] (not for attribution, on file with author).

48. See Interview with Theuermann, *supra* note 46; see also Interviews with Several Sierra Leonean Non-Governmental Organizations ("NGOs"), in Freetown, Sierra Leone (July 2004) [hereinafter Interviews with NGOs] (not for attribution, on file with author); see also Nat'l Forum for Human Rights, *supra* note 44, at 8. Many who testified did so in the hope of receiving some reparations or remunerations and were disap-

grant amnesty, and with the possibility of domestic legal proceedings in the background as leverage in South Africa—the Sierra Leonean TRC was unable to offer incentives, whether positive or negative.⁴⁹ Not only, they suggest, was there no threat, given the Lomé Accord amnesty's internal validity of prosecutions, but there was also no possibility of compensation or reparation for victims, as was available in the South African case.⁵⁰

These shortcomings led some to question whether the TRC had advanced or would advance reconciliation in the country, or even to suggest that it was more likely to open old wounds than to support reconciliation.⁵¹ Many also criticized the delay in the delivery of the TRC's report, due initially in March but delayed until September 2004, arguing that while the TRC was operational, it had drawn some interest, but with the cases proceeding in the Court and the delay of publication of the report, interest in the latter had waned.⁵²

The Court's Mandate, and Relationship to National Authorities

The Special Court is an exceptional institution, meaning that it is not part of the country's regular judiciary.⁵³ It is unusual, too, in that it addresses not only crimes under international law, but also some crimes under Sierra Leonean law.⁵⁴ It is different from other mixed processes, which were grafted onto existing domestic court systems and utilized international judicial staff.⁵⁵ The judicial system of Sierra Leone was simply too decimated for such an option to be available;⁵⁶ there was also the standard concern that any prosecution might be viewed as bi-

pointed at not receiving these; others, such as President Ahmad Tejan Kabbah, were seen as using their own testimony as a political platform.

49. See Interviews with United Nations ("U.N.") Officials and Local NGOs, in New York, New York and Freetown, Sierra Leone (June & July 2004) [hereinafter Interviews with U.N. and NGOs] (not for attribution, on file with author).

50. See *id.*

51. See Nat'l Forum for Human Rights, *supra* note 44, at 34.

52. See Interview with Edwin, *supra* note 47.

53. See Ratification Act 2002, *supra* note 27, art. 11(2).

54. See Daniel Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 *BROOK. J. INT'L L.* 347, 360-61 (2001).

55. See Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 *CRIM. L.F.* 185, 233 (2001); see also Tejan-Cole, *supra* note 27, at 124.

56. See Linton, *supra* note 55, at 233-34.

ased or as the victor's justice.⁵⁷ Offenses prosecuted before it are not, as the ratification act explicitly states, prosecuted in the name of the country.⁵⁸ The Court can request assistance from the Attorney-General, to identify and locate persons, serve documents, arrest or detain, or transfer persons to the Court.⁵⁹ Conversely, the Minister of Justice and the Attorney-General may make requests to the Court for assistance in transmitting statements and other evidence, and questioning persons detained by the Court.⁶⁰

The Court is unique in that it has concurrent jurisdiction with primacy over the courts of Sierra Leone.⁶¹ This means that upon the Court's request, domestic courts must relinquish cases to it.⁶² A much-debated exception are instances where crimes are alleged to have been committed by peacekeepers and related personnel, in which case the State sending the personnel will have primary jurisdiction.⁶³

The Court's Power and Funding

An immediately apparent weakness of the Court lies in its mandate. Because the Court was created by agreement between the U.N. and the government of Sierra Leone⁶⁴—rather than through a Security Council Resolution under Chapter VII, as were the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda⁶⁵—the Court is weak in two senses. First, the Court does not have the authority that the ad hoc tribunals have to demand extradition of suspects from other countries.⁶⁶

57. See Michelle Sieff, A "Special Court" for Sierra Leone's War Criminals, CRIMES OF WAR PROJECT: THE TRIBUNALS (May 2001), available at http://www.crimesofwar.org/tribun-mag/sierra_print.html (last visited Jan. 18, 2006); see also Tejan-Cole, *supra* note 27, at 124.

58. See Ratification Act 2002, *supra* note 27, art. 13.

59. See *id.* art. 15.

60. See *id.* art. 19.

61. See Robert Cryer, A "Special Court" for Sierra Leone?, 50 INT'L & COMP. L.Q. 435, 439-40 (2001); see also Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 416 (2001)

62. See Cryer, *supra* note 61, at 439-40.

63. See *id.* at 440.

64. See Special Court Agreement, *supra* note 29.

65. See Schocken, *supra* note 23, at 447 nn.86-89.

66. See Fritz & Smith, *supra* note 61, at 416; see also Sarah Williams, *The Cambodian Extraordinary Chambers—A Dangerous Precedent for International Justice?*, 53 INT'L & COMP. L.Q. 227, 231 (2004).

This means that indictees who seek asylum elsewhere, such as former President of Liberia Charles Taylor, can evade prosecution if the sheltering States do not choose to extradite them.⁶⁷ The Sierra Leonean conflict had regional dimensions, involving its neighbors as both targets and combatants;⁶⁸ yet, the jurisdiction of the Court is limited to the territory of Sierra Leone,⁶⁹ meaning that even if it had the power to compel extradition, it could not consider cases arising from events taking place outside the country, even if they involved atrocities related to the conflict.⁷⁰ Given that the Court will seek to try higher-level defendants and will pursue only about a dozen of those, such high-profile holdouts clearly undermine it.⁷¹

Second, because the Court was not created using Chapter VII powers, it is not the beneficiary of assessed (compulsory) U.N. contributions by Member States.⁷² Instead, the Court must solicit voluntary contributions,⁷³ despite the request by the U.N. Secretary-General Kofi Annan, that the Court be financed through assessed contributions.⁷⁴ As a result, the Court was scaled back: While initially the budget was to be US\$30.2 million for the first year and US\$84.4 million for the next two years, it is now set at US\$16.8 million for the first year and only US\$57 million total for the first three years.⁷⁵ By way of comparison, the annual budgets of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda are approximately US\$96 and US\$80 million, respectively.⁷⁶ Such financial constraints were clearly a factor in the limited scope of trials planned.⁷⁷

67. See Fritz & Smith, *supra* note 61, at 417; see also Bruce Zagaris, *European Parliament Passes Resolution Calling for Action to Ensure Taylor's Court Appearance*, 21 INT'L ENFORCEMENT L. REP. 200 (2005) (discussing Nigeria's grant of asylum to Taylor and refusal of extradition).

68. See Fritz & Smith, *supra* note 61, at 417.

69. See *id.*

70. See *id.*

71. See Chris Tenove, *Diamonds, Trials & "Savage Pit,"* TORONTO STAR, July 17, 2005, at A12.

72. See Fritz & Smith, *supra* note 61, at 416-18. Endowing the SCSL with Chap. VII powers strengthens "legal arguments that the Special Court is an organ of the U.N., afforded Security Council powers and so therefore entitled to an assessed share of the U.N.'s budget." *Id.* at 416-17.

73. See *id.* at 418.

74. See Schocken, *supra* note 41, at 453-54.

75. See *id.*

76. See *id.*

77. See *id.*

The Court has been unable to raise even the reduced budget through voluntary contributions.⁷⁸ At the time of interviews conducted in July of 2004 in Freetown, the Court had only an operating budget through December of 2004, even though it is mandated to continue work through December of 2005.⁷⁹ The Court faced a shortfall for 2004 as well, which was filled through relatively unique action by the U.N. General Assembly's Fifth Committee, taking monies for the Court from a little known "subvention fund"—unallocated assessed contributions.⁸⁰ Over US\$16 million was released for the Court in 2004, and some US\$30 million remains in the fund; it was expected that the subvention fund will be drawn upon to support the Court's work in 2005 as well.⁸¹

Limited Time Frame

The determination of the temporal jurisdiction of the Court was made for both pragmatic and political reasons. Given the scale of atrocities and the duration of the conflict, the U.N. Secretary-General determined that it would not be feasible for the Court to address atrocities stretching back to 1991.⁸² Further, there is much dispute as to the exact date of initiation of the conflict. The date of termination of the Court's jurisdiction, however, is indeterminate, as the hostilities were ongoing at the time of the Court's creation.⁸³ While a number of dates for the start of jurisdiction were proposed, some were politically tendentious because they excluded key events.⁸⁴ Ultimately, the date

78. See HUMAN RIGHTS WATCH, *BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE: ACCOMPLISHMENTS, SHORTCOMINGS, AND NEEDED SUPPORT* 41 (2004) [hereinafter *BRINGING JUSTICE*], available at <http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>.

79. See James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616 (2005); see also Advisory Comm. on Admin. & Budgetary Questions, *Request for a Subvention to the Special Court for Sierra Leone*, ¶ 4, U.N. Doc. A/58/7/Add.30 (Mar. 17, 2004).

80. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 43 n.9, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

81. See Interview with Smith, *supra* note 45; see also Interviews with Court Staff, in Freetown, Sierra Leone (July 12, 2004) [hereinafter Interviews with Court Staff] (not for attribution, on file with author).

82. See *SCSL Establishment Report*, *supra* note 35, ¶¶ 25, 26.

83. See *id.* ¶ 28.

84. See *id.* ¶¶ 26, 27.

selected was November 30, 1996, the date of the signing of the Abidjan accord, the first comprehensive peace agreement.⁸⁵ Even this date, however, has proven controversial, as prior to this date the fighting and atrocities remained largely in rural areas; it was only after such date that the fighting reached Freetown.⁸⁶ Some in Sierra Leone have argued that this unfairly implies that only atrocities occurring in Freetown matter.⁸⁷ Others have argued that the open-ended jurisdiction is also flawed, and that the Court should not have been established while hostilities were underway.⁸⁸

Child Soldiers

As already noted, the conflict in Sierra Leone was characterized by the use of child combatants. As such, children were both victims and perpetrators, and the statute of the Court reflects that complicated fact.⁸⁹ The statute provides for the possibility of prosecuting child perpetrators of atrocities between the ages of fifteen and eighteen, and also criminalizes the forcible recruitment of children for combat.⁹⁰ The possibility that individuals under the age of eighteen might be prosecuted by the Court raised serious concerns among human rights advocates and ran counter to the apparent standard set by the Rome Statute of the International Criminal Court, which limited jurisdiction of that court to those over the age of eighteen.⁹¹ Many were concerned that judicial proceedings would not help to rehabilitate and reintegrate former child combatants—many of whom were forcibly recruited and were victims themselves—but further marginalize

85. *See id.* For the full text of the peace agreement, see Peace Agreement Between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Nov. 30, 1996, available at <http://www.sc-sl.org/abidjanaccord.html>.

86. *See* Fritz & Smith, *supra* note 61, at 411-12; *see also* Tejan-Cole, *supra* note 27, at 116.

87. *See* Fritz & Smith, *supra* note 61, at 411-12; *see also* Tejan-Cole, *supra* note 27, at 116.

88. *See* Tejan-Cole, *supra* note 27, at 126 n.99.

89. *See generally* Michael A. Corriero, *Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y.L. SCH. J. HUM. RTS. 337 (2002) (discussing the challenge of reintegrating into society the over 5,000 children conscripted into the war and the country's role in this process).

90. *See* Special Court Statute, *supra* note 30, arts. 4, 7.

91. *See* Rome Statute of the International Criminal Court, art. 26, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998), available at <http://www.un.org/law/icc/statute/rome.htm>.

them.⁹² However, the concern now appears to be moot, as the Special Court's prosecutor, David Crane, announced in November of 2002 that he would not bring any cases against those between fifteen and eighteen years of age.⁹³

The Court has faced the challenge of dealing with child soldiers as perpetrators of crimes but also as victims of crimes of both forcible and voluntary recruitment.⁹⁴ While forcible recruitment is clearly criminal, there was a dispute before the Court about the prohibition of voluntary recruitment and about whether such prohibition also constituted a crime.⁹⁵ The Court, in response to a jurisdictional objection, found that recruitment of child soldiers was not only prohibited in international law, but that there had been a crystallization of a norm whose violation would attract individual criminal accountability.⁹⁶

Dispute Over the Validity of the Lomé Amnesty

The establishment of the Court has had significant ramifications for the controversial amnesty embedded in the Lomé Accord.⁹⁷ Article 10 of the Court's Statute provides that any amnesty for the crimes covered in the Statute would not be a bar to prosecution.⁹⁸ Were a blanket amnesty still in force, it would radically contract the Court's temporary jurisdiction to crimes committed only after the signing of the accord in 1999. Several

92. See Corriero, *supra* note 89, at 348-53 (discussing the issues surrounding the possible persecution of children and difficulties of rehabilitation and reintegration); see also *SCSL Establishment Report*, *supra* note 35, ¶ 35; Office of the Special Representative of the Secretary-General for Children & Armed Conflict, entry for Sierra Leone, April 29-30, 2000, available at <http://www.un.org/special-rep/children-armed-conflict/English/SierraLeone.html> (noting the marginalization of Sierra Leonian youth, who increasingly feel "used, discouraged and abandoned" and become victims of drug abuse).

93. See *Sierra Leone: Special Court Will Not Indict Children—Prosecutor*, INTEGRATED REG'L INFO. NETWORK, Nov. 4, 2002, http://www.irinnews.org/report.asp?ReportID=30752&SelectRegion=west_Africa&SelectCountry=SIERRA_LEONE.

94. See generally *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (May 31, 2004) (holding that the Article 4 of the Special Court Statute grants the Court authority to prosecute persons who commit serious violations of international humanitarian law), available at [http://www.sc-sl.org/Documents/SCSL-04-14-AR72\(E\)-131-7383.pdf](http://www.sc-sl.org/Documents/SCSL-04-14-AR72(E)-131-7383.pdf).

95. See *id.* ¶¶ 10-24 (reviewing International Conventions and Customary International law prohibiting forcible and/or voluntary recruitment of children under the age of 18); see also Alison Smith, *Child Recruitment and the Special Court for Sierra Leone*, 2 J. INT'L CRIM. JUST. 1141, 1142 (2004).

96. See *Norman*, Case No. SCSL-2004-14-AR72(E), ¶¶ 17, 30, 38.

97. See Macaluso, *supra* note 54, at 348.

98. See Special Court Statute, *supra* note 31, art. 10.

arguments, however, have been advanced against the amnesty's constraining prosecutions by the Court. First, as noted above, the U.N. issued a reservation at the time the accord was signed, indicating that the amnesty could not cover international crimes such as genocide, crimes against humanity, war crimes, or other serious violations of international humanitarian law.⁹⁹ The argument was thus made that to the degree that the amnesty was valid, it was valid only in respect of domestic crimes. Furthermore, the U.N. was not party to the agreement, but rather—along with a number of other institutions and governments—agreed to act as guarantor of the agreement.¹⁰⁰ Thus, it argued, the amnesty provision was not in breach of any agreements in the creation of the Court.¹⁰¹ The government of Sierra Leone was, however, a party to the Lomé Accord, and it had entered into a contract with the U.N. for the creation of the Court.¹⁰² The government has argued, as have others, that the amnesty provision was nullified by the continued violation of the peace accord, through fighting and atrocities, on the part of the RUF.¹⁰³ In March of 2004, the Court itself considered the validity of the amnesty provision and of Article 10.¹⁰⁴ It found that the Lomé Accord could not be considered a treaty, and that the amnesty contained in the Lomé Accord would, therefore, only have domestic effect and would be regulated by domestic law.¹⁰⁵ Consequently, it could have no effect upon an international court.¹⁰⁶

Dispute Regarding Head of State Immunity and the Legality of the Court Agreement

The unsealing of the SCSL's indictment of then-President

99. See *SCSL Establishment Report*, *supra* note 36, ¶¶ 23-24; see also S.C. Res. 1315, pmbl., U.N. Doc. S/Res/1315 (Aug. 14, 2000).

100. See Lomé Accord, *supra* note 22, art. 34.

101. See Shocken, *supra* note 23, at 450-51 (contrasting the involvement of the U.N. in the creation of the Court and the Lomé Accord with the involvement of the Government of Sierra Leone).

102. See Special Court Statute, *supra* note 31, intro.

103. See Macaluso, *supra* note 54, at 372. For criticism of these arguments, see *id.* at 372-74.

104. See *Prosecutor v. Kallon & Kamara*, Case Nos. SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004), available at <http://www.sc-sl.org/RUF-decisions.html>.

105. See *id.* ¶ 86.

106. See *id.* ¶¶ 86, 88.

of Liberia Charles Taylor while he was attending peace negotiations in Ghana shocked many in the international community.¹⁰⁷ Rather than arrest Taylor, Ghana allowed him to leave the country; Taylor has since gone into hiding in Nigeria.¹⁰⁸ Nigeria refuses to surrender him to the SCSL, having granted him “asylum,” although in June 2004, the Nigerian High Court decided to review that asylum.¹⁰⁹ The Nigerian High Court has, however, said that it would honor a request for extradition from a permanent—rather than the current interim—Liberian government.¹¹⁰ Taylor’s attorneys have filed legal challenges to the Court’s jurisdiction over him at the Court itself and at the International Court of Justice (“ICJ”).¹¹¹ The ICJ has yet to hear the case filed, in which Taylor claims that proceedings against him violate head of state immunity and requests the immediate cancellation of the arrest warrant.¹¹² The Court will not take any action with respect to this filing, however, unless Sierra Leone consents to the Court’s jurisdiction in the case.¹¹³ Taylor’s lawyers have also challenged the Court’s jurisdiction in a filing before the Liberian Supreme Court against the SCSL and the Liberian Ministry of Justice, challenging the legality of searches of homes of Taylor and his associates.¹¹⁴ They have argued that

107. See Vanguard, *Nigeria; Charles Taylor: The Continuing Tale of a Bungle*, AFRICA NEWS, Dec. 5, 2003; see also David White, *Trials Off to Mixed Start SPECIAL WAR CRIMES COURT: Officials Warn About the Potential for Trouble Making*, FIN. TIMES (London), Feb. 14, 2005, at 5. For the text of the indictment, see Prosecutor v. Taylor, Case No. SCSL-03-I, Indictment, available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-001.pdf>.

108. See Vanguard, *supra* note 107.

109. See *Nigerian High Court Agrees to Review Charles Taylor Asylum*, JUST. INITIATIVE, June 3, 2004, available at http://www.justiceinitiative.org/db/resource2?res_id=101838; see also BRINGING JUSTICE, *supra* note 78, at 40.

110. See *Sierra Leone: Taylor Could Be Tried Upon Request by Liberian Government*, INTEGRATED REG’L INFO. NETWORK, June 28, 2004, http://www.irinnews.org/report.asp?ReportID=41902&SelectRegion=west_Africa&SelectCountry=SIERRA_LEONE; see also Craig Timberg, *Liberian Warlord’s Exile Divides His Hosts in Nigeria*, WASH. POST, Oct. 10, 2005, at A22.

111. See Press Release 2003/26, Int’l Court of Justice, Liberia Applies to the International Court of Justice in a Dispute with Sierra Leone Concerning an International Arrest Warrant Issued by the Special Court for Sierra Leone Against the Liberian President (Aug. 5, 2003), available at http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipress2003/ipresscom2003-26_xx_20030805.htm. For the decision of the SCSL in the Taylor case, see Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity From Jurisdiction (May 31, 2004).

112. See Press Release, *supra* note 111.

113. See *id.*

114. See *Taylor’s Lawyers File Petition Against Special Court*, INTEGRATED REG’L INFO.

the jurisdiction of the Court does not extend beyond the borders of Sierra Leone.¹¹⁵ Some Liberian officials have rejected that argument, claiming that Liberia was obliged to respect foreign courts and proceedings,¹¹⁶ the Liberian Parliament has, however, expressly rejected the possibility of allowing Taylor to face charges before the SCSL.¹¹⁷

The SCSL has already rejected the challenge to jurisdiction on immunity grounds. Citing the ICJ's decision in the *Yerodia* case,¹¹⁸ the Court found that it could have jurisdiction, as it was an international court created by agreement between the government of Sierra Leone and the U.N. rather than a domestic court.¹¹⁹ Should the Liberian Court similarly interpret the SCSL as an international court, it seems likely to reject the objection based on lack of territorial jurisdiction.

The legality of the agreement establishing the Court has been challenged before the Special Court itself and before the Supreme Court of Sierra Leone.¹²⁰ The Special Court rejected the legal challenges, finding that the agreement was valid and was neither an excess delegation by the U.N. Security Council of its own powers, nor was it an excess transfer of jurisdiction by Sierra Leone itself.¹²¹ As of mid-2004, hearings regarding the legality of the agreement continued in the national Supreme

NETWORK, Mar. 16, 2004, http://www.irinnews.org/report.asp?ReportID=40087&SelectRegion=west_Africa&SelectCountry=LIBERIA-SIERRA_LEONE.

115. *See id.*

116. *See id.*

117. *See Liberia: Parliament Rejects Petition for Taylor to be Tried in Sierra Leone*, INTEGRATED REG'L INFO. NETWORK, Aug. 13, 2004, http://www.irinnews.org/report.asp?ReportID=42068&SelectRegion=west_Africa&SelectCountry=LIBERIA.

118. Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, [2002] 41 I.L.M. 536.

119. *See Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Prosecution, ¶¶ 35, 40, 42, 50-54 (May 31, 2004), available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>. *See generally* C. Jalloh, *Immunity from Prosecution for International Crimes: The Case of Charles Taylor and the Special Court for Sierra Leone*, ASIL INSIGHTS, Oct. 2004, pts. V & VI, <http://www.asil.org/insights/insigh145.htm>.

120. *See Prosecutor v. Gbao*, Case No. SCSL-2004-15-AR72(E), Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, ¶ 1 (May 25, 2004); *see also* *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, ¶ 1 (May 25, 2004); Interviews with Human Rights Organizations ("HROs") and Other NGOs, in Freetown, Sierra Leone (July 2004) [hereinafter Interviews with HROs and NGOs] (not for attribution, on file with author).

121. *See Gbao*, Case No. SCSL-2004-15-AR72(E), ¶¶ 5, 6.

Court.¹²²

Reception of the Court

A key obstacle for the Court has been the view by many in Sierra Leone, including its most obvious constituency, human rights and reform-oriented non-governmental organizations (“NGOs”), that the Court is an imposition, either by the government, or the international community, or both.¹²³ This view appears to have been exacerbated by the indictment of Civil Defence Forces (“CDF”) commander Samuel Hinga Norman, still viewed by many as a national hero.¹²⁴

The Court as Government Driven

Many human rights advocates view the Court as a purely government institution, even referring to it as Kabbah’s Court.¹²⁵ This has generated fears that the Court will be merely a “kangaroo” court.¹²⁶ Perversely, the view of the Court as government-driven runs in several contradictory directions. On the one hand, many view with approval the initial government request that a court be created, but only to address the actions of the Armed Forces Revolutionary Council (“AFRC”) and the RUF.¹²⁷ Yet, simultaneously, many object to the indictment of Sam Hinga Norman, arguing that he was defending a democratically elected government.¹²⁸ This objection bears within it several contradictory strains—many argue that this is the first time

122. See Interview with Lawrence Sesay, Post-Conflict Reintegration Initiative for Development and Empowerment (“PRIDE”), in Freetown, Sierra Leone (July 15, 2004) [hereinafter Interview with Sesay] (with supplemental comments from Post-Conflict Reintegration Initiative for Development and Empowerment (“PRIDE”) staff) (not for attribution, on file with author).

123. See Interview with Edwin, *supra* note 47; see also Interview with Christof Kurz, Int’l Rescue Comm., in Freetown, Sierra Leone, (July 10, 2004) [hereinafter Interview with Kurz] (not for attribution, on file with author).

124. See Interview with Edwin, *supra* note 47; see also Interview with Kurz, *supra* note 123. I discuss this case as well as the dispute between the Court and the TRC regarding testimony by Hinga Norman at the TRC below.

125. See Interview with Sesay, *supra* note 122. Ahmad Tejan Kabbah is the President of Sierra Leone.

126. See Roundtable Discussion with Members of the Human Rights Clinic, Fourah Bay Coll., Univ. of Sierra Leone, in Freetown, Sierra Leone (July 20, 2004) [hereinafter Roundtable Discussion] (not for attribution, on file with author); see also Interview with Sesay, *supra* note 122.

127. See Interview with Sesay, *supra* note 122.

128. See Interview with Edwin, *supra* note 47.

that a post-conflict court has addressed the winners—i.e., the government and the forces defending it—and that this is unacceptable.¹²⁹ That is to say, there is a belief that the government ought not be held accountable. Alternatively, others argue that Hinga Norman has been made a scapegoat—that if he is responsible for the excesses of his forces, then President Ahmad Tejan Kabbah, to whom he was answerable, must surely also answer himself to the Court.¹³⁰

The Court as International Community Driven

Alternatively, or sometimes simultaneously, detractors of the Court have argued that it is an institution driven by the international community.¹³¹ They suggest that in contrast to the TRC, which they portray as a more internal, national structure, the Court is internationally directed.¹³² In particular, they argue that the dominance of international members in high profile positions, such as that of the registrar and the prosecutor, reinforces the international nature of the Court.¹³³ Some have even suggested that the promotion of the Court is part of the larger U.S. campaign against the International Criminal Court, as it attempts to demonstrate that alternate models can work.¹³⁴ At the

129. See Interview with Theurmann, *supra* note 46.

130. See Roundtable Discussion, *supra* note 126; see also Interview with Edwin, *supra* note 47.

131. See, e.g., Interview with Kurz, *supra* note 123; see also Interview with Edwin, *supra* note 47.

132. See, e.g., Interview with Edwin, *supra* note 47.

133. See, e.g., Interview with Kurz; *Special Court for Foreign Audience Only*, THE NEWS (Freetown), Mar. 19, 2003. Note that this objection may be overstated—the Chief of the Court's Press and Public Affairs section notes that local press tend not to point out the nationality of the Prosecutor as they once did, and that the announced departure of the Registrar, a Briton, was viewed with genuine sadness by local press. Robin Vincent has since reconsidered his resignation and is staying after being asked to by the U.N. and several governments, including the government of Sierra Leone. See Interview with Allison Cooper, Chief of SCSL Press & Pub. Affairs, in Freetown, Sierra Leone (July 16, 2004) [hereinafter Interview with Cooper] (not for attribution, on file with author). It is further worth noting that the Deputy Prosecutor was appointed in consultation with the government of Sierra Leone. See *Special Court Gets New Deputy Prosecutor*, CONCORD TIMES (Freetown), July 12, 2005. The registrar was appointed in consultation with the President of the Special Court. See UN: *Secretary-General and Government of Sierra Leone Announce Election of Presiding Judges, Appointment of Registrar for Special Court*, GLOBAL NEWS WIRE, Dec. 17, 2002. The head of outreach is a Sierra Leonean. See *Sierra Leone; Briefing to the Security Council by Justice Emmanuel Olayinka Ayoola, President, The Special Court for Sierra Leone*, AFRICA NEWS, May 24, 2005.

134. See Interview with Edwin, *supra* note 47. Such a conspiratorial view may well

same time, some view the Court not only as internationally-driven, but as a betrayal of the government's initial desire to pursue only the RUF and the AFRC.¹³⁵ They suggest that the Court has overstepped in pursuing the CDF, while asking why it is, if responsibility is expanded, that all parties to the conflict are not responsible for their excesses, including UNAMSIL and the Economic Community of West African States Military Observer Group ("ECOMOG").¹³⁶ It is well worth observing in this regard that there is little or no evidence to support some of the more extreme criticisms, but the very fact that they are aired poses a problem of perception for the Court.

Do Views of the Court Vary by Group Membership?

One might expect distinct perceptions of the Court by various sectors of Sierra Leonean society; in particular, one might expect that victims perceive it rather differently than do ex-combatants, and that ex-combatants are likely to vary in their views of the Court according to previous group affiliation. It is still unclear what victims think of the Court, as no large-scale surveys of their views have been completed thus far. The best approximation of their attitudes comes from assessments of the relevance of the Court for victims made by human rights and other NGOs in Freetown. More research has been carried out as to the attitudes of ex-combatants on a host of related issues, such as democracy, participation in the political process, and intention to return to the use of force, but not directly on the issue of the

be overstated. Note that the American Prosecutor, an avid proponent of the model, argues not that hybrid tribunals can replace the International Criminal Court ("ICC"), but that they might be part of the ICC treaty's scheme of complementary jurisdiction, acting where national courts are unable to act, but in lieu of the ICC where appropriate. See Interview with Crane, *supra* note 44. This may be, however, in line with the suggestion by U.S. Ambassador-at-large for war crimes that the ad hoc tribunal must complete work by 2007 or 2008, and that the United States will provide support for domestic trials. See Stacy Sullivan, *United States Calls for Dissolution of UN War Crimes Tribunals*, CRIMES OF WAR PROJECT (Mar. 6, 2002), available at www.crimesofwar.org/onnews/news-dissolution.html.

135. See Cockayne, *supra* note 79, at 642.

136. See generally Roundtable Discussion, *supra* note 126. A repeated claim in interviews was that most Sierra Leoneans would have been satisfied with seeing prosecutions of the Revolutionary United Front ("RUF") and the Armed Forces Revolutionary Council ("AFRC"); there seemed to be a persistent objection to the idea that all parties, including government-supported ones, should on principle be subject to the Court's jurisdiction.

Court.¹³⁷ More general views of ex-combatants regarding the Court, and in fact the TRC as well, can be gleaned from those who worked with them in the process of disarmament, demobilization, and reintegration ("DDR").¹³⁸ A key benefit of the Court for victims is perhaps obvious: It allows them to see some measure of justice exacted against those responsible for the harms that they have suffered. Furthermore, and in contrast to many trials of human rights perpetrators, victims in Sierra Leone have the opportunity to see and follow the process because the Court is in the country. Some can make it to Freetown to follow the proceedings, while others can follow it, though admittedly less well, through radio programs on Radio UNAMSIL and informational spots on other radio stations, as well as through innovative outreach activities in areas up-country that radio and newspapers do not reach regularly. These include thirty-minute video summaries produced every week and distributed throughout Sierra Leone's fourteen provinces via mobile video units.¹³⁹

An additional objection to the Court has been adduced, however, by human rights and other NGOs, on behalf of the victims. This objection addresses the very mandate of the Court, seeking accountability for those who "bear the greatest responsibility" for abuses.¹⁴⁰ The objection focuses on commanders rather than direct perpetrators, and the objection, repeatedly, is

137. See Macartan Humphreys & Jeremy M. Weinstein, *What the Fighters Say: A Survey of Ex-Combatants in Sierra Leone June-August 2003*, pts. V.2 & V.3 (2003), available at http://www.columbia.edu/~mh2245/Report1_BW.pdf.

138. See generally POST-CONFLICT REINTEGRATION INITIATIVE FOR DEV. & EMPOWERMENT [PRIDE] & INT'L CTR FOR TRANSITIONAL JUSTICE [ICTJ], *EX-COMBATANT VIEWS OF THE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT IN SIERRA LEONE* (2002) [hereinafter PRIDE & ICTJ], available at <http://www.ictj.org/downloads/PRIDE%20report.pdf>. It should be noted that the concept has expanded over time, with additional "R" terms being added, such as rehabilitation, but for the sake of this analysis, I use the original term. There are some excellent analyses of the disarmament, demobilization, and reintegration ("DDR") process in Sierra Leone. See, e.g., Desmond Molloy, *The DDR Process in Sierra Leone: An Overview and Lessons Learned* (unpublished draft of manuscript, on file with the Disarmament, Demobilization, and Reintegration ("DDR") Coordination Section of UNAMSIL) (June 2004); Bengt Ljunggren & Desmond Molloy, *Some Lessons in DDR, The Sierra Leone Experience* (June 2004) (unpublished draft of manuscript, on file with author); Desmond Molloy, *Brief, DDR Coordination Section UNAMSIL for Visit of Security Council to Sierra Leone*, June 24-25 2004, (unpublished draft of manuscript, on file with author).

139. See Interview with Cooper, *supra* note 133; see also *supra* note 123 and accompanying text (discussing some of the criticisms of the Court by human rights groups).

140. See *Sierra Leone: Ending Impunity and Achieving Justice—Amnesty International's Message to the National Victims Commemoration Conference* (Amnesty Int'l, Paper No. 51/

that victims wish to know why it is that a commander is in custody, rather than the man who actually cut off a hand, or burned down a house.¹⁴¹ The criticism is often carried further, suggesting that the interpretation of greatest responsibility is incorrect—that it is those direct perpetrators who in fact do bear it, not those who “just” gave orders.¹⁴² On this account, the prosecutions at the Court will, therefore, not address the needs of victims, many of whom are said to feel abandoned by the government.¹⁴³ Many victims and witnesses before the Court have expressed the expectation that they might receive compensation for their efforts or suffering, but this—with some limited exceptions to cover costs for witnesses—is not feasible;¹⁴⁴ many victims complain that their needs are not addressed and point to DDR benefits for ex-combatants by contrast.¹⁴⁵

One might expect that ex-combatants would have a uniform and negative view of a Court designed to punish their commanders and impliedly condemn their own activities. Given the complex nature of warring factions in Sierra Leone, however, the situation is somewhat more complicated. First and foremost, it is the case that ex-combatants of all groups were suspicious of the Court, fearing that they themselves would be indicted by it.¹⁴⁶ This suspicion arguably extended beyond the Court, leading many to fear testifying before the TRC, despite the explicit announcement by the prosecutor that he would not use testimony to the TRC as evidence for indictments or prosecutions, but many former fighters simply did not believe him.¹⁴⁷ This suspicion, however, may or may not have had a lasting impact on

004/2005 (Public), 2005), *available at* <http://web.amnesty.org/library/print/EN-GAFR510042005>.

141. *See* BRINGING JUSTICE, *supra* note 78, at 20.

142. *See* Interview with Edwin, *supra* note 47; *see also* Interview with Bangora, *supra* note 44.

143. *See* Interview with U.N. Official, in Freetown, Sierra Leone (July 19, 2004) [hereinafter Interview with U.N. Official] (not for attribution, on file with author).

144. *See* Interview with Bangora, *supra* note 44; *see also* Thordis Ingadottir, Victims of Atrocities—Access to Reparations, (background paper for the International Conference on War Crimes—Searching for Justice: Comprehensive Action in the Face of Atrocities, June 4-6, 2003), *available at* http://www.pict-pcti.org/publications/PICT_articles/WARCRIME.PDF.

145. *See* Interview with Edwin, *supra* note 47.

146. *See* PRIDE & ICTJ, *supra* note 138, at 14, 19.

147. *See* Interview with Sesay, *supra* note 122. Several human rights observers, speaking on the condition of anonymity, agreed with this point.

the work of the TRC—according to some observers, this concern abated after a few months and they began to testify.¹⁴⁸ Similarly, there have been concerns that fear of indictment might have deterred some fighters from engaging in the DDR process.¹⁴⁹ However, given the extensive nature of the DDR in Sierra Leone, and the apparently broad-based buy-in to the process, the ultimate effect appears to have been negligible.¹⁵⁰ As already discussed in this Essay, however, the primary objection amongst some ex-combatants has been the decision to pursue cases against the CDF, and in particular the case against Sam Hinga Norman.¹⁵¹ Former CDF fighters view themselves and Norman as heroes who defended the democratically elected government, and resent being called to account.¹⁵² This resentment has led to rumors and fears that supporters of Hinga Norman will seek to destabilize the country.¹⁵³ One editorial in a Freetown paper expressed its concerns as such: “We only hope this Court will not leave behind an ugly legacy that will spark another war in this country. You see, Chief Norman has a very large following that is angry with the treatment currently meted out to him.”¹⁵⁴

Systematic surveys of ex-combatants conducted by a local NGO with international support, endorse cautious skepticism. Their analyses find moderate levels of support for the Court and the TRC, which increases following sensitization or outreach

148. See Interview with Crane, *supra* note 44. Several human rights observers, speaking on the condition of anonymity, agreed with this point.

149. See Interview with Molloy, *supra* note 46; see also PRIDE & ICTJ, *supra* note 138, at 19.

150. See Interview with Molloy, *supra* note 148. This fear, however, remains a valid one for the future. A Special Court team visiting from Liberia in July to provide information about the Court learned that the rumor among some fighters undergoing DDR was that their cards, issued to provide them access to DDR programs and benefits, had a secondary purpose—to identify them for indictment before the SCSL. See Interview with Cooper, *supra* note 133.

151. See Interview with Edwin, *supra* note 47; see also *Sierra Leone War Crimes Trials to Begin June 3*, AGENCE FRANCE PRESSE, May 13, 2004, available at <http://www.globalpolicy.org/intljustice/tribunals/sierra/2004/0511start.htm>

152. See PRIDE & ICTJ, *supra* note 138, at 12, 16.

153. See *Norman Says: Special Court Lied Against Me*, CONCORD TIMES (Freetown), Jan. 27, 2004, at front page; see also Dsman Benk, *As Courthouse Opens Police Clamp Down on Free Norman Supporters*, CONCORD TIMES (Freetown), Mar. 11, 2004; Dsman Benk, *For Talking to Norman Kamajor Administrator Arrested*, CONCORD TIMES (Freetown), Jan. 27, 2004.

154. See *Watch out, Sierra Leoneans!! The Special Court Could Leave an Ugly Legacy Behind*, THE DEMOCRAT (Freetown), Apr. 2004, at 3.

processes.¹⁵⁵ It is worth noting that support of RUF ex-combatants, many of whom see themselves as victims of forcible recruitment and betrayal by their ex-commanders, express relatively strong support for the Court, as well as willingness to testify.¹⁵⁶ Conversely, CDF ex-combatants, the vast majority of whom joined willingly, and who believe that they helped to defend the nation and the democratically elected government, express greater resistance to the Court.¹⁵⁷

Outreach—Efforts, Limits, and Dealing With Embedded Prejudices

Given that a notable failure of international tribunals has been their inability to communicate with the affected society, and the placement of hybrid tribunals in the territory of the country where crimes occurred, the importance of outreach for the SCSL cannot be underestimated. Indeed, the outreach effort has been impressive, but it is also worth noting that it was limited by at least two factors—one internal and one external.

Outreach has been extensive and quite timely compared to other tribunals. The outreach for the SCSL began well before the Court was functional, overlapping with the workings and outreach of the TRC. Indeed, on some occasions, the outreach activities were carried out jointly. Outreach was initially conducted by the Prosecutors—often by the Prosecutors themselves—who visited every district in the country in the process.¹⁵⁸ Outreach offices are present in every province in the country.¹⁵⁹ In addition, outreach programs are aired regularly on radio stations across the country, and outreach officers have established “Accountability Now” clubs in universities and engage in extensive training of key sectors of civil society on substantive issues around the Court.¹⁶⁰

155. See Beth K. Dougherty, *Searching for Answers: Sierra Leone's Truth and Reconciliation Commission*, 8 AFR. STUD. Q. 39, 48 (2004), available at <http://web.africa.ufl.edu/asq/v8/v8i1a3.pdf>; see also PRIDE & ICTJ, *supra* note 138, at 16.

156. See *id.*; see also PRIDE & ICTJ, *supra* note 138, at 11, 16.

157. See PRIDE & ICTJ, *supra* note 138, at 12, 16.

158. See Interview with Binta Mansaray, Outreach Dir., SCSL, in Freetown, Sierra Leone (July 22, 2004) [hereinafter Interview with Mansaray] (not for attribution, on file with author).

159. See *id.*

160. See, e.g., E-mail from Patrick Fatoma, Senior Outreach Assoc., SCSL, to Chandra Lekha Sriram, Prof. of Human Rights, East London Sch. of Law (July 28, 2004).

The Office of the Principal Defender also conducts outreach now that it is operational.¹⁶¹ However, this development points squarely to some of the internal limitations of the outreach process. Because outreach was initially largely conducted by the Prosecutor, this heightened profile generated an identification of the Court with the Prosecution, even though outreach was formally housed in the Office of the Registrar.¹⁶² The creation of a separate Outreach Section came later, with a permanent director appointed in January 2003.¹⁶³ Similarly, because the Office of the Principal Defender became operational after the Office of the Prosecutor, its outreach activities began later, contributing to the (mis)perception that the Court and the prosecution were one and the same.¹⁶⁴ The Outreach Section and the Principal Defender have worked assiduously to address this perception, with the Defender pursuing outreach around the country and through high-profile appearances to combat this early problem.¹⁶⁵

Outreach also suffered from a perceived lack of importance or legitimacy within the Court, according to the Outreach Director.¹⁶⁶ She has suggested that while certain staff, such as the Registrar and the Prosecutor, recognized the importance of outreach from the outset and pursued it vigorously, many legal staff did not.¹⁶⁷ This was in part, she has suggested, due to the lack of prioritization for it in terms of funding—the Court's management committee decided not to fund outreach and thus funding had to be found elsewhere.¹⁶⁸

Finally, it appears that outreach, and perhaps the image of the Court generally, suffered from an obstacle beyond its control—embedded biases and preconceptions. For at least some who view the Court as politicized, it is possible that no amount of outreach will change their minds. Many respondents suggested, for example, that ex-combatants fearing testimony before the TRC would be shared with the Court maintained that fear, not

161. See Interview with Mansaray, *supra* note 158. The Office of the Principal Defender advises, assists, and represents criminal defendants in the Special Court.

162. See *id.*

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. See *id.*

168. See *id.*

because they were unaware of the Prosecution's assurances, but because they did not believe them.¹⁶⁹ For this reason, the Outreach Director observed that it is perhaps not surprising that children receiving outreach at schools were considerably more receptive to it than many adults.¹⁷⁰ Another Court employee suggested off the record that the Court was very effective at getting information out, but that the perceptions of it within the country varied significantly, with particular concerns surrounding both the indictment of Hinga Norman and the decision not to indict President Kabbah.¹⁷¹

The Legacy of the SCSL: Unrealistic Expectations?

A common criticism of international trials is that they fail to assist national reconciliation and do not contribute to the re-institution of the rule of law.¹⁷² It might perhaps be hoped that mixed tribunals, by virtue of functioning within the society affected, can counter the first objection. Significant hopes have been pinned on the SCSL's capacity to assist in the second as well.¹⁷³ Recent research by the United Nations Development Programme ("UNDP") and the International Center for Transitional Justice has indicated that many in Sierra Leone hope that

169. See Interview with Edwin, *supra* note 47; see also Interview with Sesay, *supra* note 122. But compare this with the relatively positive effect of sensitization efforts recorded by PRIDE and ICTJ, and local citizens' willingness to participate in the TRC process, even if information were to be shared with the Court. See PRIDE & ICTJ, *supra* note 138, at 7. The Final Report of the Truth and Reconciliation Commission of Sierra Leone may reflect positive attitudes that declined by the summer of 2004, or may yet provide a fuller reflection of attitudes than do individual opinions provided in interviews with this author. See TRUTH & RECONCILIATION COMM'N, FINAL REPORT OF THE TRUTH & RECONCILIATION COMMISSION OF SIERRA LEONE (2004), available at <http://trc-sierraleone.org/drwebsite/publish/index.shtml>.

170. See Interview with Mansaray, *supra* note 158.

171. See Interviews with Court Staff, *supra* note 81. See discussions of the Hinga Norman disputes elsewhere in this chapter. Even the decision to grant Hinga Norman's petition to represent himself before the court is viewed with suspicion in some quarters. See Interview with Sulaiman Jabati, Executive Sec'y, Coal. for Justice & Accountability, in Sierra Leone (July 16, 2004) (not for attribution, on file with author). For the decision permitting Hinga Norman's self-representation, see *Prosecutor v. Norman*, Case No. SCSL-2004-14-T-125, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court (June 8, 2004), available at <http://www.sc-sl.org/Documents/SCSL-04-14-T-125.pdf>.

172. See Chris McMorran, *International War Crimes Tribunals*, in BEYOND INTRACTABILITY (Guy Burgess & Heidi Burgess eds., 2005), available at http://www.beyondintractability.org/m/int_war_crime_tribunals.jsp.

173. See Fritz & Smith, *supra* note 61, at 403-07.

the Court will leave behind a greater “legacy” than simply the record of a few prosecutions.¹⁷⁴ Great—perhaps unrealistic—hopes are that it will contribute to institution-building in the country, helping to rebuild a shattered judiciary, revitalize legal education, and assist in legal reform even as it is expected to contribute to reconciliation. Many involved in the work of the Court hope to meet some of these expectations, although there are real concerns that seeking to do so may divert efforts of Court staff, and more generally, that the Court is not the appropriate institution to support broader capacity-building in the country.¹⁷⁵

First and foremost, there is an expectation that the Special Court can help to rebuild the shattered judicial system. The Court is formally separate from the judicial system of Sierra Leone.¹⁷⁶ This separation has created concerns among the members of the Court that they must ensure that they leave a legacy for the country beyond the specific trials.¹⁷⁷ External actors, such as donors and the U.N., are also concerned that the Court’s activities serve to benefit and strengthen the domestic legal and judicial system.¹⁷⁸ This is particularly important in Sierra Leone, where the court system lacks even the most basic elements, including law reports from past decisions. The system is rife with funding and morale problems, corruption, and challenges to independence.¹⁷⁹

Members of the Court have attempted to engage in outreach to domestic legal authorities, members of civil society groups, and the law school in Freetown.¹⁸⁰ This outreach effort is intended to build basic legal capacity, to explain the role of the prosecutions and the procedure, and to include the rationale for due process and the need for defense attorneys.¹⁸¹ The relationship of the Court to national justice mechanisms has not

174. See ICTJ & UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], THE “LEGACY” OF THE SPECIAL COURT FOR SIERRA LEONE 5-9 (Sept. 29, 2003) (draft for discussion) [hereinafter ICTJ & UNDP], available at <http://www.ictj.org/downloads/LegacyReport.pdf>.

175. See *id.* at 5-7.

176. See *id.* at 4.

177. See *id.* at 6-7.

178. See *id.*

179. See Schocken, *supra* note 23, at 438; see also ICTJ & UNDP, *supra* note 174, at 1.

180. See ICTJ & UNDP, *supra* note 174, at 5-7.

181. See *id.* at 13-20.

been consistently positive. The Court has necessarily lured many talented legal experts away from current or potential roles in the national legal system. It has also taken land from the Prison Service, including land intended for a new training school.¹⁸²

The outreach staff of the Court has also sought to train local chiefs and other leaders regarding the Court, while simultaneously seeking to make the work of the Court comprehensible and interesting to those actors.¹⁸³ In particular, they have sought to workshop the links between international legal standards of due process and rule of law and the processes of traditional justice.¹⁸⁴ This could prove to be important, as many Sierra Leoneans are little-affected by the formal legal sector, but do participate in traditional justice.¹⁸⁵ Simultaneously, however, some critics have suggested that addressing the crimes of the past would be better done through traditional modes, such as purification and cleansing ceremonies, and that, at the very least, these traditional activities certainly ought to supplement more formal ones.¹⁸⁶

Actors involved in the functions of the Special Court—whether from UNDP, bilateral donors and the World Bank, or the judges themselves—are far more concerned with the impact of the Court on victims, the wider community, and national legal capacity than has been the case in other externalized or mixed tribunal experiences.¹⁸⁷ This is certainly a positive development. There have been, however, negative effects on local capacity, and outreach is still limited.¹⁸⁸ The Court is correctly not specifically designed to be a mechanism to build national legal capacity. Concerns should remain, however, if the Court diverts atten-

182. See Press Release, Press & Pub. Affairs Office, Special Court for Sierra Leone (Oct. 11, 2002), available at <http://www.sc-sl.org/Press/pressrelease-101103.html>; see also *Special Court Takes Over Prison Camp*, AFRICA NEWS, Oct. 2, 2002.

183. See Interview with Mansaray, *supra* note 158.

184. See *id.*

185. See *id.*; see also Interview with Alfred Carew, Head of the Nat'l Forum for Human Rights, in Freetown, Sierra Leone (July 15, 2004)) [hereinafter Interview with Carew] (on file with author).

186. See, e.g., Interview with Carew, *supra* note 185 (pointing out that many Sierra Leoneans belong to secret societies that have such rituals to address past harms); see also AUDE-SOPHIE RODELLA, JUSTICE, PEACE, AND RECONCILIATION IN POST-CONFLICT SOCIETIES: THE CASE OF SIERRA LEONE 120-21 (2003), available at <http://fletcher.tufts.edu/research/2003/Rodella-Aude-Sophie.pdf>.

187. See ICTR & UNDP, *supra* note 174, at 1-3, 9, 22, 24-25.

188. See *id.* at 11.

tion and resources from other domestic needs, as it appears likely to do. It may be the case that the experience of the Court will be better than that in East Timor.

What Can the Legacy of the Court Be and What Are Its Limits? The View from Freetown

There appear to be two divergent views within Freetown about the possible legacy of the Special Court beyond "leaving behind a building." While registry and prosecution staff is optimistic about the Court's potential in this regard, many NGOs and some diplomats are more circumspect, if not frankly pessimistic.¹⁸⁹ While many agree that the physical infrastructure will, at least, benefit the local judicial system after the Court vacates it, even that is a matter of some dispute.¹⁹⁰

Robin Vincent, the Court's Registrar, offers three types of legacy that the Court may leave for Sierra Leone: bricks and mortar, people (training), and organizational structures.¹⁹¹ Most obviously, the court facility that will remain in Freetown after the Court completes its work is impressive indeed—it offers modern courtrooms, an extensive library specializing in international humanitarian and human rights law, a secure and sanitary detention facility, and office space for the prosecution, defense, and other staff.¹⁹² With regard to people, despite criticism of the Court as Western, approximately half of Court staff is Sierra Leonean.¹⁹³ Registry staff are approximately sixty percent Sierra Leonean, and the Outreach staff are entirely Sierra Leonean; the finance staff are all African, though not all Sierra Leoneans.¹⁹⁴ The detention facility currently employs approximately forty Sierra Leoneans,¹⁹⁵ who will bring their training in international standards to the domestic penal system when they return

189. *See id.* at 5-7, 9-10; *see also* Cockayne, *supra* note 79, at 659-63.

190. *See* Cockayne, *supra* note 79, at 660.

191. *See* Interview with Vincent, *supra* note 46.

192. *See* ICTJ & UNDP, *supra* note 174, at 5; *see also* Press Release, Press & Pub. Affairs Office, Special Court for Sierra Leone (Oct. 11, 2002), available at <http://www.sc-sl.org/Press/pressrelease-031004.html>. The Royal Institute of British Architects, The Guild of Architectural Ironmongers Ironmongery Specification Awards 2005 awarded a commendation to the SCSL facility. For a report on the award, visit <http://www.all-good.co.uk/certs/pdf/GAI%202005%20Award%20Pamphlet.pdf>.

193. *See* Interview with Vincent, *supra* note 46.

194. *See id.*

195. *See id.*

to work there. The internship program endeavors to take on roughly equal numbers (ten to twelve) of international and national interns, but, in reality, this has proved difficult because of a lack of Sierra Leonean applicants, although their applications through local universities have been strongly encouraged.¹⁹⁶ According to Vincent, while Sierra Leoneans are employed in a mixture of administrative and professional posts that tilts towards the administrative, there are sixteen Sierra Leoneans in professional positions across the Court.¹⁹⁷ Finally, the Court can bequeath training and proper judicial practice to a judiciary that has been notoriously corrupt and subject to political manipulation, and which essentially collapsed during a decade of conflict.¹⁹⁸

The Special Court has conducted a survey of the Chief Justice's own office and made key recommendations to aid organization and capacity-building.¹⁹⁹ The Court will invite the Attorney General of Sierra Leone to send observers, and has done an evaluation of key needs of the judiciary for the Chief Justice of the Special Court.²⁰⁰ The Court will invite the Chief Justice to send national judges to observe proceedings.²⁰¹ The jurisprudence of the Court itself offers a demonstration of the rule of law and due process in a country that has seen little of either, including procedural protections for witnesses and defendants alike.²⁰² Perhaps the greatest legacy is none of the specific benefits suggested above, but that of combating impunity in a country and a region where it has prevailed, demonstrating that accountability is possible.²⁰³ They point to the relatively high level of those indicted by and in the custody of the Court to suggest that

196. *See id.*

197. *See id.*

198. *See id.*; *see also* HUMAN RIGHTS WATCH, JUSTICE IN MOTION: THE TRIAL PHASE OF THE SPECIAL COURT FOR SIERRA LEONE 33-35 (2005) [hereinafter JUSTICE IN MOTION], <http://hrw.org/reports/2005/sierraleone1105/sierraleone1105.pdf>.

199. *See* Interview with Vincent, *supra* note 46; *see also* JUSTICE IN MOTION, *supra* note 198, at 3.

200. *See* Interview with Vincent, *supra* note 46.

201. *See id.*; *see also* JUSTICE IN MOTION, *supra* note 198, at 35.

202. *See* Cockayne, *supra* note 79, at 657-58, 663-74. Even human rights groups skeptical of the Court have expressed hope that the Court's exclusion of the death penalty as an option will assist in the campaign to eradicate it domestically. *See* Roundtable Discussion, *supra* note 126.

203. *See* Interview with Vincent, *supra* note 46; *see also* Interview with Smith, *supra* note 46.

it poses a significant challenge to the “big man” impunity seen to be so common in the country.²⁰⁴

For each of these prospective benefits of the Court, there are detractors who say that such benefits are overstated or entirely illusory. Even the structure itself is not without its detractors. Many have argued that the Court facility is an expensive white elephant—costly to maintain and ill-designed for the functioning of an ordinary judiciary should the domestic courts seek to move into it.²⁰⁵ Even Vincent recognizes that once the site is turned over to the national government, it will be costly to maintain.²⁰⁶ Some have suggested that the Court ought to have never been built, that the national law courts and prison facility would have served the same purposes and had an important symbolic effect for the country and the bolstering of the judicial system.²⁰⁷ Others have suggested that the facility might still be of great use, but might better be used not by the domestic courts, but as a training facility, either for the sub-region or for Africa, for international humanitarian and human rights law.²⁰⁸ Alternatively, it has been reported that the Court might extend its jurisdiction to Liberia,²⁰⁹ or that the site could be used as the site of any Special Court for Liberia, both of which are contentious suggestions.²¹⁰ The Special Court for Sierra Leone will not extend its jurisdiction to Liberia, but the site could be used if a Special Court is to be set up for Liberia. This, however, is speculation only and not based on any fact.²¹¹

Skeptics question whether the Court will have a significant impact in terms of training personnel who will return to the local judiciary or corrections system, noting that many are likely to

204. See Interview with Crane, *supra* note 44. This is a benefit imputed by many to the Court, even by some of its greatest skeptics.

205. See Cockayne, *supra* note 79, at 660.

206. See Interview with Vincent, *supra* note 46.

207. See ICTJ & UNDP, *supra* note 174, at 8, 10.

208. See Cockayne, *supra* note 79, at 660 n.190.

209. See Interview with Theuermann, *supra* note 46.

210. See Interviews with U.N. and NGO Staff, in Freetown, Sierra Leone (July 2004) [hereinafter Interviews with U.N. and NGO Staff] (not for attribution, on file with author).

211. According to Bert Theuermann, the Special Representative of the U.N. Secretary General for Liberia, Jacques Paul Klein, has suggested that jurisdiction might be so extended. See Interview with Theuermann, *supra* note 46. Others have speculated that a Liberian court might use the SCSL facilities. See Interviews with U.N. and NGO Staff, *supra* note 210.

leave Sierra Leone to reap the benefits of that training, and that many who do return to domestic work will be disappointed not only by small salaries, but also by poor working conditions.²¹² Some allege that a brain drain has already begun, with many local UNAMSIL staff pursuing opportunities abroad.²¹³ They suggest that, perversely, the legacy might be to deprive Sierra Leone of many of its most skilled, rather than improving local capacities.²¹⁴ Skeptics also doubt that institutional or organizational capacities will be improved, suggesting that embedded corruption in the judicial and other sectors must first be rooted out, and that this will be a daunting task.²¹⁵ Finally, there are some that doubt that the demonstrative effect of combating impunity will be significant, pointing out that some of the key “big men” responsible for atrocities in Sierra Leone are not in the custody of the Court, as they are either dead, in hiding, or outside of the country. Western diplomats and human rights NGOs, therefore, are skeptical about the potential for the Court’s legacy, seeing the meaning of the term as “elusive.”²¹⁶

Some skeptics go further, worrying that the Court might well bequeath a “negative” legacy, either because it continues to be viewed as a political tool, or because the international funding poured into it has a distorting effect not just upon the local economy, but specifically on the development or reconstruction of the weak legal sector.²¹⁷

TIMING AND SECURITY: DID THE COURT BEGIN OPERATIONS TOO EARLY?

The U.N. peacekeeping operation, UNAMSIL, and the DDR process have been widely viewed as successful.²¹⁸ Nonethe-

212. See Interview with Edwin, *supra* note 47.

213. See Interview with Smith, *supra* note 46.

214. See Interviews with HROs and NGOs, *supra* note 120.

215. See Interviews with a Western Diplomat, Human Rights Organizations and Other NGOs, in Freetown, Sierra Leone (July 2004) (not for attribution, on file with author).

216. See *id.*

217. See Interviews with Court Staff, *supra* note 81.

218. For a skeptical view that nonetheless recognizes the accomplishments of UNAMSIL, see CLIFFORD BERNATH & SAYRE NYCE, REFUGEES INTERNATIONAL, REPORT ON THE UNITED NATIONS MISSIONS IN SIERRA LEONE: UNAMSIL—A PEACEKEEPING SUCCESS, LESSONS LEARNED (2002), available at http://www.refugeesinternational.org/files/3050_file_RIUNAMSIL.pdf; and Molloy, The DDR Process in Sierra Leone, *supra* note 138.

less, there were concerns from the outset that the operation of the Court would begin too early, perhaps undermining DDR if fighters feared indictment. Happily, these fears do not appear to have been borne out.²¹⁹ Nonetheless, many skeptical NGO observers suggest that the Court did begin operation too early, examining crimes and societal rifts best left to heal; many have even suggested that a delay of five years or so would have been appropriate.²²⁰ Conversely, the Prosecutor points out that any delay might have undermined justice, making it more difficult to obtain perpetrators, witnesses, and evidence; as it stands, one key perpetrator, Foday Sankoh, died while in custody of the Court.²²¹ As discussed above, the issue of timing has also been fraught with substantial disagreement as to the viability of operating a commission of inquiry and a court simultaneously.²²²

After UNAMSIL—Prospects for Peace, Security, and Justice

Individuals interviewed for this research from a variety of sectors in Sierra Leone expressed pessimism regarding the future of Sierra Leone after the withdrawal of UNAMSIL.²²³ This was often articulated as an expectation that after withdrawal, fighting would simply resume.²²⁴ In some instances, this was couched as likely to come in the form of an attack from outside,²²⁵ in others as a re-mobilization of combatants.²²⁶ In general, there was skepticism that the government could or would provide basic services or address corruption, which were seen as key “root” causes of the conflict, and there was also far greater faith in international than national actors to provide for services and security.²²⁷ This widespread expectation that con-

219. See *Elections in Sierra Leone: A Step Toward Regional Stability?: Hearing Before the Subcomm. on Africa of the H. Comm. on Int'l Relations*, 107th Cong. 59-76 (2002) (statement of John Prendergast, co-Director of the Africa Program, International Crisis Group). But see Interview with Molloy, *supra* note 46 (stating that the Court impacted DDR by pushing people underground or out of the country).

220. See Interviews with NGOs, *supra* note 48.

221. See Interview with Crane, *supra* note 44.

222. See Interview with Theurmann, *supra* note 46.

223. See Interview with Kurz, *supra* note 123; see also Interview with Edwin *supra* note 47; Interview with Theurmann, *supra* note 46.

224. See, e.g., Interview with Theurmann, *supra* note 46.

225. See Interview with Kurz, *supra* note 123.

226. See Interview with Theurmann, *supra* note 46.

227. See Interviews with U.N. Officials, in Freetown, Sierra Leone (July 2004) [hereinafter Interviews with U.N. Officials] (not for attribution, on file with author).

flict will resume may also have a dampening effect either upon the functioning or on impact of the Court—to the degree that people fear retribution for testifying or otherwise cooperating with the Court, they are less likely to do so.

A Special Court for Liberia?

Many of the lessons learned from the experiences of the SCSL may prove to be relevant for any future prosecutions in Liberia, beyond the issue of the pursuit of Charles Taylor. But the SCSL might also have a more direct impact upon Liberia. In addition to discussions of the creation of a similar court for Liberia, the idea has been floated that the Court could itself take up Liberia-centered cases.²²⁸ Further, there has been some suggestion that the site of the SCSL could be used for any Liberian court, if created.²²⁹ The perceived linkage to the SCSL in Liberia is such that, according to one interviewee, there is a widespread belief amongst demobilizing Liberian fighters that the card issued to them entitling them to DDR benefits will also be used to identify them for indictment before the SCSL.²³⁰ In the meantime, the transitional Liberian government announced the creation of a TRC in November of 2004.²³¹ This commission may become contentious itself, as, according to sources, the members had been selected in the summer of 2004, well before any such commission was formally mandated, leading to speculation that it would be biased.²³²

CONCLUSION: PROBLEMS AND PROSPECTS OF MIXED JUSTICE

I have suggested that mixed tribunals might not be able to address the flaws of internal and external justice in the ways that their advocates suggest they might.²³³ I then turned to the some-

228. See Interview with Theuermann, *supra* note 46.

229. See Interviews with U.N. and NGO Staff, *supra* note 210.

230. See Interviews with U.N. Officials, *supra* note 227.

231. Information describing features of the Truth and Reconciliation Act of Liberia may be found at the website of the United Nations Mission in Liberia, www.unmil.org/images/liberia_trc_act_summary.pdf.

232. See Interviews with NGO Staff, in Freetown, Sierra Leone (July 2004) (not for attribution, on file with author); see also INT'L CRISIS GROUP, SIERRA LEONE'S TRUTH AND RECONCILIATION COMMISSION: A FRESH START? 5 (2002), available at http://www.crisis-group.org/library/documents/report_archive/A400858_20122002.pdf.

233. See *supra* note 5 and accompanying text.

what unrealistic expectations placed upon the SCSL to consider the prospects for that institution in addressing key concerns for that society.²³⁴ I argued that the Court has significant shortcomings that may limit its ability to operate successfully or contribute to the needs of that post-conflict country.²³⁵ Furthermore, I suggested that the particular expectations placed upon the Court to provide capacity-building and a broader legacy for the country's judiciary may be unrealistic.²³⁶ I argue that trials in mixed tribunals, like those in purely domestic or international institutions, are not necessarily a panacea, addressing all needs of societies emerging from violence, repression, or war.

234. *See supra* notes 174-188 and accompanying text.

235. *See supra* notes 63-87 and accompanying text.

236. *See supra* notes 171-187 and accompanying text.